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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 257

STATE OF FLORIDA ex rel. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, as Sheriff of Dade County, Florida,

Appellee

JURISDICTIONAL STATEMENT

STATEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION.

The appellant, having presented its petition for the allowance of an appeal in this cause to the Supreme Court of the United States, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

This appeal is prosecuted from a final judgment of the Supreme Court of the State of Florida, which affirmed the decision of the Circuit Court of the Eleventh Judicial Cir-

cuit in and for Dade County, Florida, remanding appellant McKeighan to the custody of appellee Jimmy Sullivan, Sheriff of Dade County, Florida, under a rendition warrant of the Governor of the State of Florida issued pursuant to an interstate rendition requisition of the Governor of the State of Michigan. The judgment of the Supreme Court of Florida, which is the highest court of the State of Florida, was entered April 1, 1947. A petition for rehearing was denied by the Supreme Court of Florida on April 21, 1947. No opinion was written by the court on either its decision of April 1, 1947, or its decision denying the petition for rehearing. On April 23, 1947, the court granted a stay of execution and enforcement of its judgment, for ninety days from April 21, 1947, so that review by this Court might be sought.

The jurisdiction of this Court rests upon the provisions of Section 237 of the Judicial Code, as amended (28 U. S. C. 344), on the ground that in this cause the validity of certain State statutes was drawn in question, as repugnant to the Constitution and to the laws of the United States, and the decision of the Supreme Court of Florida was in favor of the validity of those statutes.

(b) Statutes Involved

The statutes involved in this cause are as follows:

(1) The extradition statute of the State of Florida, Florida Laws c. 20460, Sec. 3 (Fla. Stat. Ann. 941.03), which reads:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under Sec. 941.06, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by an authenticated copy

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of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of a warrant supported by an affidavit made before a committing magistrate of the demanding state; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand."

The Florida statute is the Uniform Criminal Extradition Act, with minor local changes.

(2) Section 505 of the Penal Code of the State of Michigan (Mich. Stat. Ann. 28.773), which reads:

"Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five years or by a fine of not more than two thousand five hundred dollars."

(3) The federal statute governing extradition (18 U. S. C. 662), which reads:

"Whenever the executive authority of any State or Territory demends any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committeed treason, felony, or other crime, certified as authentic by the governor

or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory. (R. S. Sec. 5278.)"

(c) Dates Involved

The final judgment of the Supreme Court of the State of Florida was rendered on April 1, 1947. A petition for rehearing was denied on April 21, 1947.

The petition for appeal in this cause was presented and filed on July 9, 1947.

(d) History of the Case

This case arose when the appellant McKeighan was arrested and placed in custody under the alleged authority of a rendition warrant issued by the Governor of Florida, pursuant to an interstate rendition requisition of the Governor of Michigan. The Michigan requisition was supported by an information, in conformity with the law of Florida. On October 6, 1946, appellant filed a petition for a writ of habeas corpus in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, asking that he be discharged from custody on the ground that he was being unlawfully detained by the appellee Sheriff and that the appellee was holding him without legal authority. On October 15, 1946, the Circuit Court entered an order denying

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the motion that appellant be discharged, and ordering the appellant remanded to the appellee for custody. From that order an appeal was taken, on the same day, to the Supreme Court of the State of Florida.

The Supreme Court of Florida, on April 1, 1947, entered an order affirming the judgment of the Circuit Court. No opinion was written. On April 15, 1947, a petition for rehearing was filed by appellant, and on April 21, 1947, the petition for rehearing was denied, again without opinion. On April 23, 1947, the Supreme Court of Florida entered an order staying execution of its judgment pending review by this Court.

The grounds upon which appellant sought discharge from custody were that (1) the Florida statute governing extradition proceedings is invalid because it is in conflict with the federal statute governing extradition; (2) the information, upon which the Florida rendition warrant and the Michigan requisition are founded, is without legal effect because it rests upon a Florida statute in conflict with a federal statute, and a Michigan statute repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States; and (3) the warrant upon which appellant is held is fatally defective under the federal statute governing extradition, in that it fails to identify with particularity the documents relied upon.

The validity of the Michigan statute was challenged in the trial court orally by counsel for appellant (Transcript of proceedings, pages 22, 23, 24), was preserved in the Ninth Assignment of Error of appellant under a general challenge to constitutionality (Record, p. 119), and was argued at length in the brief in the Supreme Court of Florida (Brief, pp. 85-108). The point was again specifically set forth in paragraph III of the petition for rehearing. The trial court's opinion did not specifically refer to this issue. The

Supreme Court of Florida wrote no opinion on either the original appeal or the petition for rehearing.

The invalidity of the Florida extradition statute, as in conflict with the federal extradition statute, was raised in the petition for rehearing. The Supreme Court of Florida wrote no opinion.

The challenge to the rendition warrant was raised in the petition for rehearing. The Supreme Court of Florida wrote no opinion.

(e) Nature of Case and Substantiality of Questions Involved

Appellant has challenged in this case the validity of two important state statutes, and has in addition raised important points going to the sufficiency of basic documents under the federal extradition statute. The Florida extradition statute, in particular, involves an issue that requires decision by this Court, since the Florida statute is (with only slight local modifications) the Uniform Criminal Extradition Act, which has been adopted by 31 states and Hawaii.[1] The issue raised here by appellant—whether Section 3 of the Uniform Criminal Extradition Act is in conflict

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[1] Alabama (Code 1940, Tit. 15, Sec. 50); Arizona (Code 1939, Sec. 44-3603); Arkansas (Pope's Dig. Sec. 6083); California (Penal Code, Sec. 15482); Delaware (Laws 1937, c. 213, Sec. 3); Hawaii (Rev. Laws 1945, Sec. 10633); Idaho (Code 1932, Sec. 19-4603); Indiana (Burns, Ann. Stat., Sec. 9-421); Kansas (Gen. St. Ann., 1943 Supp., Sec. 62-729); Maine (Rev. Stat. 1944, c. 139, Sec. 3); Maryland (Code 1939, Art. 41, Sec. 15); Massachusetts (Ann. Laws Supp., c. 276, Sec. 14); Michigan (Comp. Laws Suppl. 1490, Sec. 17513-3); Minnesota (M.S.A. Sec. 629.01); Montana (Rev. Code Supp., Sec. 12428-3); Nebraska (Rev. Stat. 1943, Sec. 29.703); New Hampshire (Rev. Laws 1942, c. 437, Sec. 3); New Jersey (N.J.S.A 2.185-11); New Mexico (1941 Comp., Sec. 42-1903); New York (McKinney's Crim. Code, Sec. 830); North Carolina (Gen. Stat. 1943, Sec. 15-57); Ohio (Gen. Code, Sec. 109-3); Oregon (O.C.L.A. Sec. 26-2603); Pennsylvania (Purdon's P.S.A. Sec. 191.3); South Dakota (S. D. Code, Sec. 34.1703); Utah (Code 1943, Sec. 105-56-29); Vermont (P. L., Sec. 2508); Virginia (Code 1942, Sec. 5070.c); West Virginia (Laws 1937, c. 42); Wisconsin (Stat. 1945, Sec. 364.03); Wyoming (Comp. Stat. 1945, Sec. 10-2403).

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with the federal statute, in permitting a requisition to be based upon an information supported by an affidavit—has never been passed upon by this Court, nor has this Court ever passed upon whether an information, such as is here involved, is sufficient under the federal statute, whether or not it is authorized by state law. The use of an information in extradition proceedings, therefore, raises two distinct questions never decided by this Court:

(1) Where a state statute, such as the Uniform Criminal Extradition Act, authorizes the use of an information supported by an affidavit, is that statute in conflict with the federal statute, which requires either an indictment or an affidavit made before a magistrate?

(2) Is an information sufficient, under the federal extradition statute, to support an interstate rendition requisition, whether or not an information is authorized by state law?

That the use of an information is of at least dubious legality was recognized by the framers of the Uniform Act and was frankly stated. A footnote to Section 3 of the proposed Uniform Act, found in *9 Uniform Acts Annotated 175*, states:

> "The recognition of informations in states which allow them is probably supported by *Hogan vs. O'Neill*, 1921, 41 S. Ct. 222, 255, U. S. 52, 65 L. Ed. 497."
>
> *Hogan vs. O'Neill*, the case cited, is quite obviously irrelevant.

The federal statute, which is an implementation of Article IV, Section 2 of the Constitution, is an action of the federal government designed to make uniform, in all the states of the Union, the method of effecting interstate rendition of fugitives. *Innes* vs. *Tobin* 240 U. S. 127; *Kentucky* vs. *Dennison*, 24 How. 66. The extradition clause of

the Constitution is not self-executing but is made effective by act of Congress. *Roberts* vs. *Reilly*, 116 U. S. 80; *U. S. ex rel. Darcy* vs. *Superintendent of County Prisons*, 111 F. (2d) 409; (C. C. A. 3rd, 1940): *U. S. ex rel., Silver* v. *O'Brien*, 138 F. (2d) 217 (C. C. A. 7th, 1943). In an attempt to make uniform the types of documents upon which the important act of extradition might be based, the federal statute designated (a) an indictment, or (b) an affidavit made before a magistrate. It must be assumed that in doing so, Congress considered that these documents were of sufficient dignity to justify interstate rendition, while other documents might not be; and it would appear that in so specifying, Congress intended to occupy the field. Only by occupying the field *could* Congress establish a uniform system of extradition; and the very point of the federal legislation was that methods of proof should not be left to the states, which might legislate differently. *Kentucky* vs. *Dennison*, 24 How. 66. It is thus obvious that the several states have not the power to establish, though it be under the name of Uniform Act, a "uniform" method of extradition which is at variance with the mandate of Congress. And the fact that the federal statutes does not expressly bar state action is immaterial. "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel Co.* v. *New York Labor Relations Board*, No. 55, October Term, 1946, decided April 7, 1947. Thus the only function of state legislation on interstate rendition can be to aid the federal statute. *In re Harris*, 309 Mass. 180, 34 N. E. (2d) 504 (1941).

That an information, such as forms the basis for rendition in this case, does not satisfy the federal extradition statute, has been held a number of times by federal and

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state courts. *Ex Parte Morgan*, 20 Fed. 298 (D. C. Ark. 1883); *In Re Hart*, 63 Fed. 249 (C. C. A., 4th 1894); *Ex Parte Owen*, 10 Okla. Cr. 284, 136 P. 197 (1913); *Ex Parte Lewis*, 75 Tex. Crim. Rep. 320, 170 S. W. 1098 (1914); *Ex Parte Chittenden*, 124 Tex. Cr. Rep. 228, 61 S. W. (2d) 1008, 1933). These cases all arose before the passage of the Uniform Act. But of course the adoption of a state statute adds no authority to a mode of extradition not sanctioned by Congress. It is compliance with the federal statute alone that gives to the Executive authority of the asylum state the power to issue a warrant of arrest. *Compton* vs. *Alabama*, 214 U. S. 1.

In this connection appellant has challenged also the sufficiency of the form of the documents here relied upon, aside from the Florida statute. In interstate rendition, the face of the warrant must show conformity to the federal statute. *Ex Parte Hagan*, 295 Mo. 435, 245 S. W. 336 (1922). The warrant of the Executive authority of the asylum state must set forth and recite with particularity the indictment or affidavit on which it is based. *In re Doo Woon*, 18 Fed. 898 (D. C. Ore — 1883). The warrant in this cause, under which appellant is held in custody, recites that the Executive authority of Michigan has filed with the Executive authority of Florida "a copy of Affidavit made before a Michigan magistrate, and Information found." This does not state which of these documents is relied upon, and, if referring to an affidavit, does not specify any particular affidavit. This record contains eleven different affidavits. The federal statute requires further that the document relied upon be "certified as authentic by the governor or chief magistrate" of the demanding state. The warrant in this cause asserts that it is based on an "Affidavit made . . . and information found" which "is" certified as authentic by the Executive authority of Michigan, thus failing to specify on its face the document

meeting the federal requirement. These points, while formal in nature, go to the jurisdiction of the Executive authority of the asylum state. *In re Doo Woon,* 18 Fed. 898 (D. C. Ore. 1883); *Ex Parte Morgan,* 20 Fed. 298 (D. C. Ark. 1883). The federal statute must be strictly construed as to these requirements. *Ex Parte Owen,* 10 Okla. Crim. Rep. 284, 136 P. 197, (1913); *Ex Parte Hart,* 63 Fed. 249 (C. C. A. 4th 1894). Proof may not be offered to show supporting documents; the face of the warrant must specify satisfactory papers. *Ex Parte Bourland,* 132 Tex. Cr. Rep. 434, 105 S. W. 251 (1937). As a matter of actual fact, the transcript of proceedings in the trial court (Record, pp. 15, 16, 22-24) and the Order of the trial court (Record p. 26) show that it is the *information* which is relied upon by the demanding authorities, but the warrant fails to be specific.

The third point raised by appellant is the invalidity of the Michigan statute (Section 505 of the Michigan Penal Code, set out *supra* under "Statutes involved"). This statute purports to make any indictable offense at the common law," for which no express statutory punishment is provided, a *felony* punishable by imprisonment for five years or by a fine of not more than $2500. Appellant, in the trial court and in the Supreme Court of Florida, challenged this statute as in violation of the due process clause of the Fourteenth Amendment to the Constitution.

Appellant contends that this criminal statute, a catch-all for the myriad common law crimes which may turn up by court decision at any time, is plainly in violation of the Fourteenth Amendment in that it fails to lay down an ascertainable standard of punishment, it fails to inform citizens of the acts for which punishment is provided, and it involves a patent absurdity, in that it requires a conspiracy to commit a *misdemeanor* to be punished as a *felony.* That is precisely the situation in this cause. The appellant is

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charged with conspiracy to keep and maintain for hire, gaming rooms, gaming tables and devices, and games of chance, in violation of Sections 302-306 of Act 328 of the Public Acts of 1931 (Mich. Stat. Am. 28.534-28.538). In every one of these Sections, the completed act is declared to be a misdemeanor. But appellant is charged, not with having performed these acts, but with having *conspired* to do so. And, since no statute of Michigan declares such a conspiracy unlawful, the State calls this a common law conspiracy; but since no punishment is prescribed for such a conspiracy, the State then resorts to Section 505 for the source of the crimes here charged, on the ground that this conspiracy is an "indictable offense at the common law."

Of course a basic tenet of constitutional law is that a penal statute must be sufficiently definite to inform persons of the nature of the crime. *Lanzetta* v. *New Jersey*, 306 U. S. 451, and cases cited. A statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

Without examining in any way the criminal law of Michigan, it is apparent that Section 505 contemplates that Michigan criminal law is partly statutory and partly common law. This alone is a wide range in which a citizen is held to be responsible, but Section 505 extends the felony punishment to "any indictable offense at the common law" for which no statutory punishment is expressly prescribed. This requires first a survey of the common law, to ascertain indictable offenses, next a survey of statutory punishment which may or may not have been prescribed, and finally a reference back to Section 505. Surely a legislature may not pick up loose ends by enacting a sweeping criminal

statute of this uninformative and vague nature. Due process of law requires a more ascertainable standard.

(f) Conclusion

This cause involves not only two important State statutes, one of them now in force in 32 American Jurisdictions, as to which important Federal questions are raised; it involves also the extraordinary writ of *habeas corpus*, concerning which courts are not eager to find formal defects or to scrutinize it "with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350. This Court itself has jurisdiction to issue a writ of *habeas corpus* "for the purpose of an inquiry into the cause of restraint of liberty," 28 U. S. C. 451, 452, and has power to do so, with regard to appellant in this cause, at any time. Thus the Federal questions raised here are within the present competency of this Court and ought to be considered by it without regard to technicalities of pleading, if in fact the Court concludes that the questions are substantial. Present consideration of the questions would avoid, both for this Court and for appellant, the necessity of appellant seeking review on a new writ of *habeas corpus*. *Cf. Ex Parte Hawk*, 321 U. S. 114. It is therefore urged that this Court consider and pass upon the Federal questions presented in this appeal.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 257

STATE OF FLORIDA EX REL. WILLIAM H. McKEIGHAN,

Appellant,

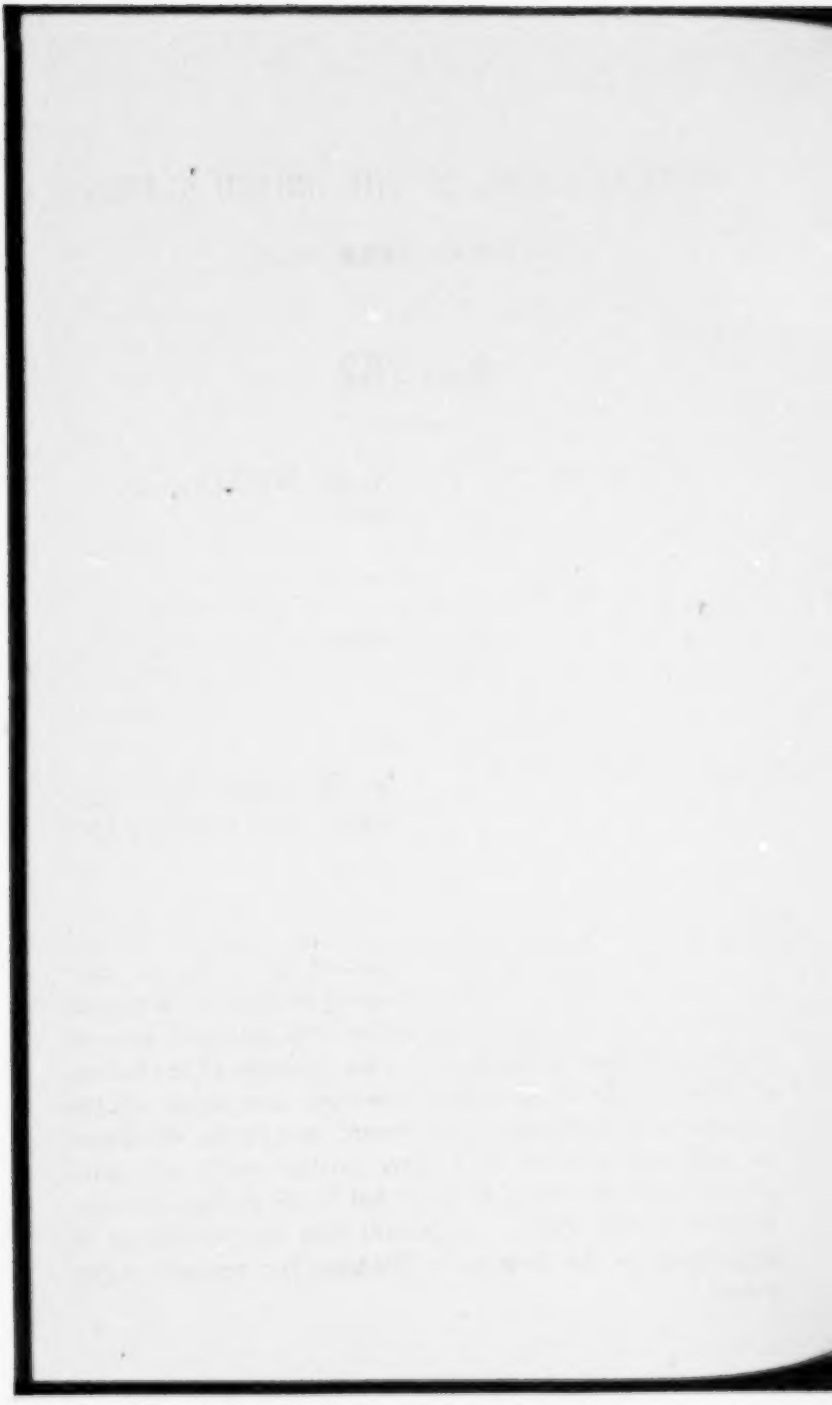
vs.

JIMMY SULLIVAN, AS SHERIFF OF DADE COUNTY, FLORIDA

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

NEVILLE MILLER,
Counsel for Appellant.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 257

STATE OF FLORIDA EX REL. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, AS SHERIFF OF DADE COUNTY, FLORIDA,

Appellee

STATEMENT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL AND STATEMENT AGAINST JURISDICTION.

In answer to Appellant's statement as to the jurisdiction of this Court to review this cause on appeal. Appellee has filed a statement in opposition and has incorporated therein a Motion to Dismiss. In the interests of the saving of time, of the avoidance of needless duplication of the machinery and efforts of this Court, and of the avoidance on technical grounds of a mere postponement of issues which must ultimately be conceded to be within the competence of this Court. Appellant files this statement in opposition to the Motion to Dismiss, for reasons stated below.

The basic defect in Appellee's Motion to Dismiss, as revealed by the supporting statement, is that it ignores the fact that this cause is founded on *habeas corpus,* and that issues going to illegal restraint of liberty are always timely in *habeas corpus* proceedings. *Bowen* v. *Johnston,* 306 U. S. 19. They cannot be permanently dissipated because of technical defects, such as are alleged in Appellee's statement, but can be raised immediately upon dismissal of an appeal, in another petition for *habeas corpus. Waley* v. *Johnston,* 316 U. S. 101. It is not possible in *habeas corpus* proceedings to forfeit, automatically, legitimate grounds merely upon technical objections going to the timeliness or procedure of raising these grounds. *Habeas corpus* is an extraordinary remedy, invoked in exceptional circumstances; and "Among these exceptional circumstances are those indicating a conflict between State and Federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." *Bowen* v. *Johnston,* 306 U. S. 19, 27.

Thus it is apparent that if this appeal should be dismissed upon the points stated in the statement of Appellee, nothing in this cause would be solved or settled; for Appellant might immediately seek another writ of *habeas corpus* on the very grounds asserted here, and *in the new habeas corpus proceeding the questions would be timely raised. Hawk* v. *Olson,* 326 U. S. 271; *Ex Parte Hawk,* 321 U. S. 114. Another long trail of appeals would then be instituted, coming ultimately to this Court—and on that second appeal, no such technical objections could be raised. But this is not all; as Appellant's Jurisdictional Statement in its Conclusion pointed out, this cause is within the present competency of the Court in its original jurisdiction to issue a writ of *habeas corpus,* 28 U. S. C. 451, 452, and on this ground any argument making against jurisdiction ought to

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be discounted. The only question for this Court ought to be whether in fact a substantial Federal question requiring decision by this Court, is involved in the cause at bar. Cf. *Johnson* v. *Zerbst*, 304 U. S. 458.

It should be noted in conclusion that the Motion to Dismiss does not question the importance and substantiality of a number of issues raised in Appellant's Assignment of Errors, particularly the challenge to the Uniform Criminal Extradition Act as adopted by Florida, and the challenge to the sufficiency of the underlying documents (one of which is a warrant based upon the notorious Michigan "one-man Grand Jury" device): and thus it is obvious that even were Appellee's objections sustained as to jurisdiction of this Court to review on appeal, this cause involves substantial and important Federal questions; and under the provisions of 28 U. S. C. 237(c), this appeal should not be dismissed but should be considered as a petition for certiorari.

For these reasons Appellant opposes the Motion to Dismiss and asks that it be overruled.

Respectfully submitted,

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August 1, 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 257

STATE OF FLORIDA EX REL. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, SHERIFF OF DADE COUNTY, FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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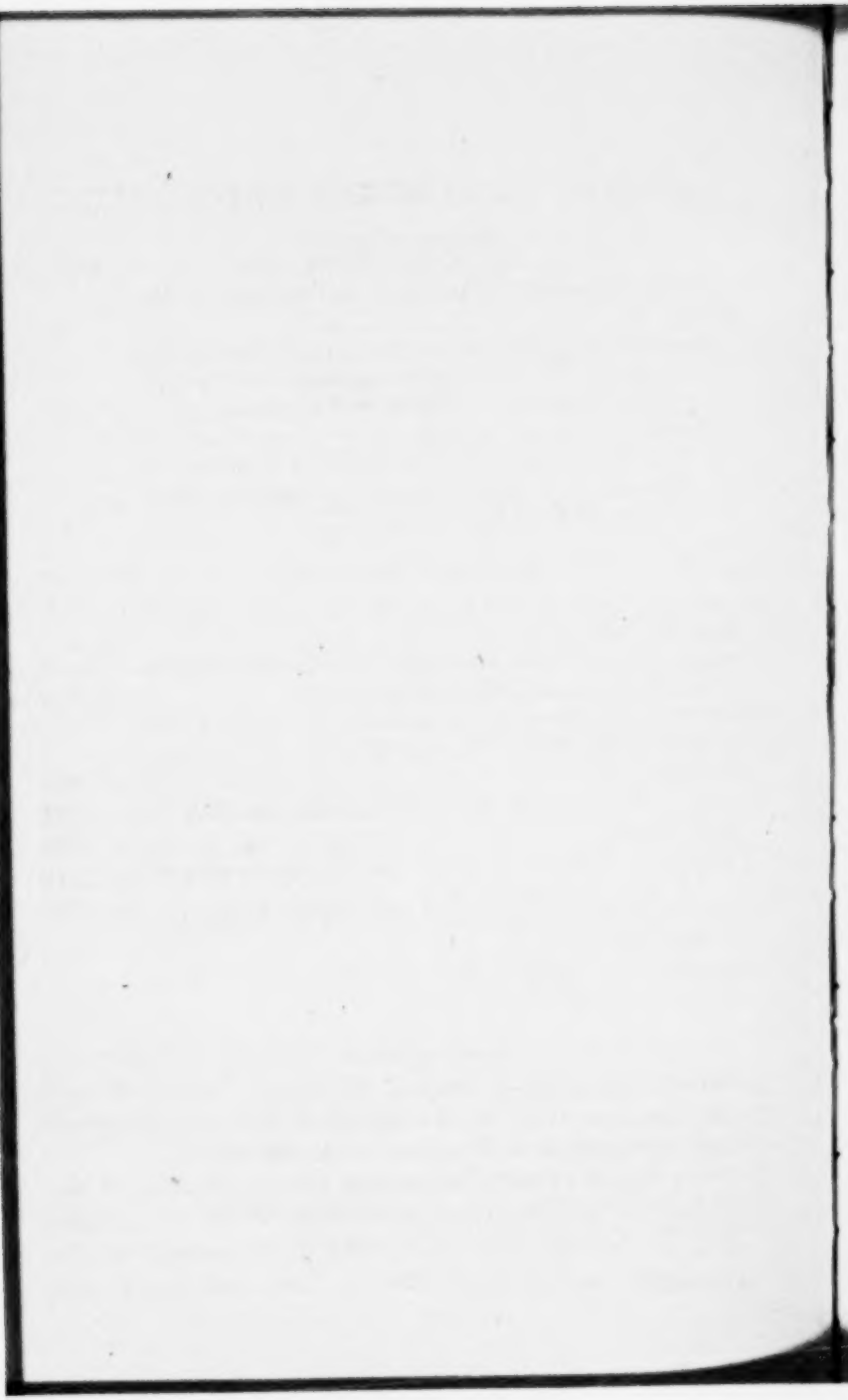

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 257

STATE OF FLORIDA ex rel. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, as Sheriff of Dade County, Florida,

Appellee.

STATEMENT OF APPELLEE AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION AS ASSERTED BY THE APPELLANT AND APPELLEE'S MOTION TO DISMISS THE APPEAL.

Appellee herein sets forth his statement disclosing the matters and grounds making against the jurisdiction of this Court asserted by the appellant and incorporates in such statement its motion to dismiss the appeal.

The appellant seeks to ground the jurisdiction of this Court upon the provisions of Section 237 of the Judicial Code, as amended (28 U. S. C. 344), on the ground that the validity of certain State Statutes have been drawn into

question as repugnant to the Constitution and to the laws of the United States and that the decision of the Supreme Court of Florida was in favor of the validity of those Statutes.

The Statutes, the constitutionality of which is alleged by the appellant as having been drawn into question, are Section 941.03, Florida Statutes 1941, which reads as follows:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under § 941.06, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by an authenticated copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of a warrant supported by an affidavit made before a committing magistrate of the demanding state; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand."

and Section 505 of the Penal Code of the State of Michigan which reads as follows:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five years or by

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a fine of not more than two thousand five hundred dollars."

The appellant also asserted under his jurisdictional statement that the validity of the rendition warrant, issued by the Governor of the State of Florida, pursuant to the rendition requisition of the Governor of the State of Michigan, was drawn into question as being in conflict with the Federal Statute governing extradition (18 U. S. C. 662).

It should be noted that the Supreme Court of Florida wrote no opinion in the cause but simply affirmed the judgment of the lower Court without opinion; and that on the petition for rehearing it merely denied the petition for rehearing without opinion.

(a) Grounds Making Against the Jurisdiction of This Court as Asserted by the Appellant and in Support of Appellee's Motion to Dismiss Appeal.

The grounds making against the jurisdiction of this Court as asserted by the appellant and in support of appellee's Motion to Dismiss the appeal are:

1. That while the constitutionality of Section 505 of the Penal Code of the State of Michigan, *supra,* was raised before the lower Court (Circuit Court in and for Dade County, Florida) and the Supreme Court of the State of Florida, yet it does not appear that a decision on the validity of Section 505 of the Penal Code of the State of Michigan was necessary for the determination of the cause nor that the constitutionality of Section 505 of the Penal Code of the State of Michigan was actually decided nor does it appear that the judgment could not have been given without deciding it.

2. That the constitutionality of Section 941.03, Florida Statutes 1941, was not raised or drawn into question by the

appellant except on its Petition for Rehearing before the Supreme Court of the State of Florida, which petition was denied without opinion.

3. That the alleged conflict of the executive warrant issued by the Governor of the State of Florida and the Federal Extradition Statute was not raised or drawn into question except upon Petition for Rehearing filed before the Supreme Court of the State of Florida, which Petition for Rehearing was denied without opinion.

(b) Statement of Law in Support of Grounds Against the Jurisdiction of This Court as Asserted by the Appellant and in Support of Appellee's Motion to Dismiss the Appeal.

1. Section 505 of the Penal Code of the State of Michigan, *supra,* was the statute upon which the information charging the crime against the appellant was predicated. This information (typewritten transcript 95-102), together with the supporting affidavits, was the basis for the rendition requisition issued by the Governor of the State of Michigan and upon which the rendition warrant was issued by the Governor of the State of Florida. The record, while it shows that the constitutionality of this Section, was raised, *yet it does not appear from the record that the Circuit Court in and for Dade County, Florida or the Supreme Court of Florida passed on the validity of the statute* nor does it appear that a decision on the validity of such statute was necessary for the determination of the cause nor does it appear that the judgment could not have been given without deciding the validity of the statute.

It was urged by the appellee before the Supreme Court of Florida (appellee's Brief 29-30) that the Supreme Court of Florida should not pass upon the constitutionality of Section 505 of the Penal Code of the State of Michigan,

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supra, but should leave this matter to the Supreme Court of Michigan. This Court, in the case of *Pearce* v. *State of Texas et al.,* 155 U. S. 311, 39 L. Ed. 164, 15 Sup. Ct. Rep. 116, stated that the Court of Criminal Appeals of the State of Texas did not err in refusing to pass upon the constitutionality of a statute of the State of Alabama under which a fugitive from justice from the State of Alabama was indicted, and held:

> "• • • What the state court did was to leave the question as to whether the statute was in violation of the constitution of the United States, and the indictments insufficient accordingly, to the demanding state. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and if any of those rights should be denied him, which is not to be presumed, he could then seek his remedy in this court."

This Court further held in the case of *Henry* v. *Henkel,* 235 U. S. 219, 228, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54, 57:

> "The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, *or the unconstitutionality of the statute, state or federal, on which the charge was based.* In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void. But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court • • • has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is

it intended as a substitute for the functions of the trial court. Manifestly this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based." (Italics supplied.)

The above views have been succinctly set forth as follows:

"* * * No question as to the constitutionality of a statute under which a charge is made in the demanding state may be raised in a habeas corpus proceeding brought to obtain a prisoner's discharge from custody under a warrant for his extradition to such state for trial. * * *"

25 Am. Jur. 195.

It therefore appears:

(a) That the Supreme Court of Florida did not affirmatively pass on the constitutionality of Section 505 of the Penal Code of the State of Michigan, *supra;*

(b) That a determination of the constitutionality of such Section was not necessary to a final adjudication of the cause; and

(c) That the Supreme Court of Florida should not have passed upon the constitutionality of such Section.

This Court has held on innumerable occasions:

"In order to give this court jurisdiction of a writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively that a Federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it."

First National Bank of Easterville, Iowa, et al., v. *City Council of Easterville, et al.*, 215 U. S. 341, 54 L. Ed. 223, 30 Sup. Ct. Rep. 152.

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To the same effect see *Western Union Telegraph Company* v. *Sid Wilson*, 213 U. S. 52, 53 L. Ed. 693, 29 Sup. Ct. Rep. 403, 404; *Edward Bonner et ux.* v. *Henry P. Gorman et al.*, 213 U. S. 86, 53 L. Ed. 709, 29 Sup. Ct. Rep. 483; *Chesapeake & Ohio Railway Company* v. *J. W. McDonald*, 214 U. S. 191, 53 L. Ed. 963, 29 Sup. Ct. Rep. 546.

(2) The constitutionality of Section 941.03, Florida Statutes 1941, and the validity of the rendition warrant issued by the Governor of the State of Florida herein challenged by the appellant were not raised except upon the Petition for Rehearing before the Supreme Court of the State of Florida.

Under Rule 25 of the Rules of the Supreme Court of Florida, which rule provides for the filing of a petition for rehearing, paragraph (b) states:

> "(b) The petition shall not assume any new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely the omissions, oversight, causes or grounds on which it is based, and must point out specifically in what respect the original opinion and decision is deemed to be erroneous in some material matter of law or fact."

The Petition for Rehearing was denied without an opinion, by the Supreme Court of the State of Florida, and it is readily apparent by the reading of the above and foregoing rule that the petition filed by the appellant was in direct violation of that rule. This Court has held on innumerable occasions that nothing is better settled than that it is too late to raise a Federal question for the first time in a Petition for Rehearing, after the final judgment of the State Court of last resort. We shall not unduly burden this Court with citations from the numerous authorities but shall, for the sake of brevity, quote only from the case of

Samuel McMillen et al. v. *Ferrum Mining Company*, 197 U. S. 343, 49 L. Ed. 784, 25 Sup. Ct. Rep. 533, 535, in which this Court held:

> "It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question. Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 Sup. Ct. Rep. 934; Miller *v.* Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874"

It is therefore respectfully submitted that this Court should refuse to take jurisdiction of this cause and should grant appellee's Motion to Dismiss the appeal.

Respectfully submitted,

EUGENE F. BLACK,
Attorney General of
the State of Michigan;
MELVIN E. ORR,
Assistant Attorney General
of the State of Michigan;
(S.) J. VELMA KEEN,
Tallahassee, Florida,
Attorneys for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 257.

STATE OF FLORIDA ex rel. WILLIAM H. McKEIGHAN,
Appellant,

v.

JIMMY SULLIVAN, as Sheriff of Dade County, Florida,
Appellee.

Appeal from the Supreme Court of the State of Florida.

PETITION FOR REHEARING.

NEVILLE MILLER,
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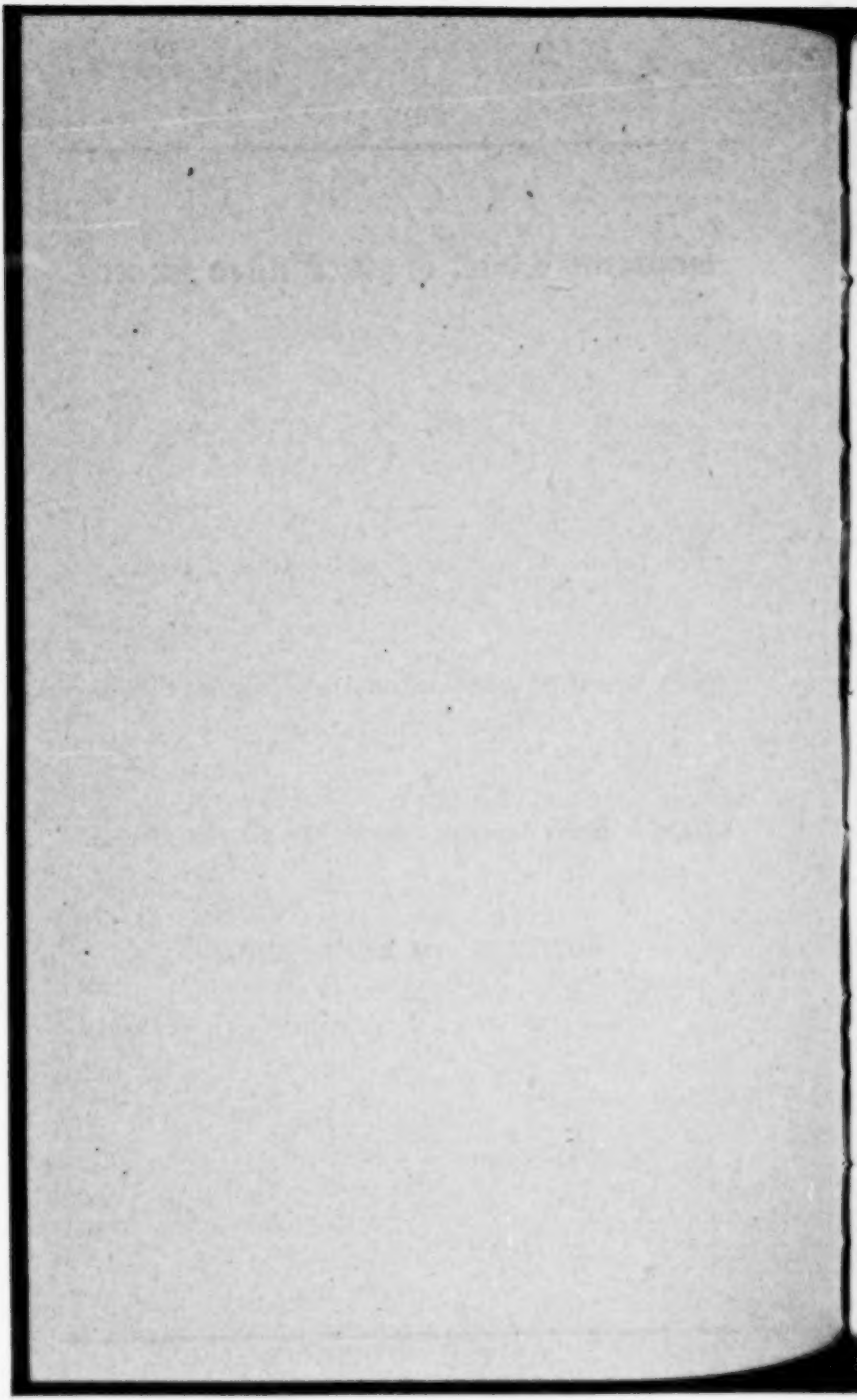
PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 257.

STATE OF FLORIDA ex rel. WILLIAM H. McKEIGHAN,
Appellant,

v.

JIMMY SULLIVAN, as Sheriff of Dade County, Florida,
Appellee.

Appeal from the Supreme Court of the State of Florida.

PETITION FOR REHEARING.

The appeal in this case was dismissed *per curiam* by this Court on October 13, 1947, "for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it". The court below, the Supreme Court of Florida, wrote no opinion in this matter, either originally or upon the motion for rehearing in that court. Nor did it adopt the decision of the trial court. The record reveals that all the proceedings in this case stem from only one source—the Florida extradition statute, which is

the Uniform Criminal Extradition Act. Since Appellant has drawn the validity of that Act into question as against the federal extradition statute, Appellant finds it impossible to perceive in the case any non-federal ground adequate to support the judgment of the court below.

This is not a case in which are involved two or more independent grounds, federal and non-federal, so that the judgment of the court below may be said to rest on a non-federal ground adequate to support it, even if that court has erroneously decided the federal ground. Since interstate extradition is founded upon the federal statute, since the Florida statute is but an implementation of the federal act, and since every action in this case was performed pursuant to the Florida statute, there cannot be any action in the case possessing an independent non-federal status. Whatever non-federal aspects the case may appear to have on the surface, analysis will show that the non-federal grounds are interwoven with the federal grounds and are not susceptible of isolation and separate determination.

Appellant therefore petitions this Court for rehearing so that these questions may be explored and the case may be presented in its correct jurisdictional framework.

CERTIFICATE OF GOOD FAITH.

Counsel certifies that this Petition for Rehearing is presented in good faith and not for delay.

NEVILLE MILLER.

October 27, 1947.

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No. 257. FLORIDA EX REL. MCKEIGHAN *v.* SULLIVAN, SHERIFF. Appeal from the Supreme Court of Florida.

Per Curiam: The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Neville Miller* for appellant. *Eugene F. Black*, Attorney General of Michigan, and *J. Velma Keen* for appellee. Reported below: 30 So. 2d 106.